closed in the affidavit *i.e.* the sources in paragraph 10(a), and the grounds in paragraph 10(a) and (b). On careful scrutiny of the relevant affidavit and the annexures attached thereto, I am satisfied that there are merits showing that the applicants have a *prima facie* defence *i.e.* at the very least an inference of contributory negligence on the part of the deceased driver of motor-car BC. 3694 can be drawn, if the issue of negligence or liability for the accident is decided upon by the court in the normal way. In other words, there is some prospect of their being at least partly successful.

On the question of reasonable excuse for the applicants not having entered an appearance, I would quote a passage in *Evans* v. *Bartlam, supra*, in the judgment of Lord Atkin at page 480 which is as follows: -

"It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set aside is one of the matters to which the court will have regard in exercising its discretion... The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by failure to follow any of the rules of procedure."

Further, Lord Wright at page 489 says: -

"The primary consideration is whether he has merits to which the court should pay heed; if merits are shown the court will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication... The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the court in its discretion is empowered by the rule to impose...

Taking the above into consideration there is good reason to justify my allowing the application to set aside the interlocutory judgment in default entered against the defendant and giving leave to the applicants to enter an appearance and defend the plaintiffs' claim in the action for and in the name of the defendant. I therefore make the order accordingly.

With regard to costs, however, the applicants should bear them by paying to the plaintiffs all costs thrown away by reason of their default.

Application allowed.

Solicitors: *K. A. Menon & Co.; Murphy & Dunbar.*

ABDULMAJID v. HAJI ABDULRAZAK

[O.C.J. (Chang Min Tat J.) August 12, 1971]

[Ipoh — Originating Summons No. 273 of 1971]

Practice and Procedure — Disputes as to facts — Application by way of originating summons — Not suitable medium or process for determination of issues — R.S.C. 1957 O. 55 rr. 4 & 9.

Practice and Procedure — Costs — Plaintiff wanting in frankness — Distortion of facts in affidavit.

In September 1970 the defendant executed a deed in favour of his son the plaintiff and his wife in consideration of his natural love and affection for them. In this case, the orders sought for by the plaintiff/grantee against his father, the grantor, were for carrying out the trust as in the deed, by the court for all necessary vesting and other orders in respect of the trust property and for all proper consequential directions, accounts and enquires. The plaintiff applied for these orders by way of originating summons under R. S. C. O.55 r.4, to which application the grantor applied to set aside the proceedings on a objection taken to the use of an originating summons. In his affidavit in support, he denied that there was a valid trust as he produced evidence indicating a subsequent change of heart. He contended that in view of the disputes arising as to the facts, the action should have been commenced by writ.

Held: (1) questions of jurisdiction apart, courts would refuse to decide questions of fact on an originating summons as a matter of some inconvenience;

(2) in the circumstances of this case, the grantor's subsequent change of heart may have led to another consensual variation. If so, then it remained for the court to find what was the actual agreement reached. If it did not, then the question remained whether the grantor had so bound himself contractually that he must be made to perform specifically any contract entered into validly by him and as varied consensually. This meant, at the least, that evidence would have to be led, and therefore an originating summons was not a suitable medium or process for the determination of the issues raised;

(3) in this case as the plaintiff was wanting in frankness and his last affidavit was a distortion of facts, he should bear the costs of the proceedings.

Cases referred to:-

(1) *Re Yeap Chor Ee* [1954] M.L.J. 248.
(2) *Ponniah* v. *Chinniah* [1961] M.L.J. 66.
(3) *Foon Seong* v. *Chan San Choon* [1947] M.L.J. 85.
(4) *Ong Yok Chu & Anor.* v. *Yong Teck Fong & Anor.* [1960] M.L.J. 292.
(5) *In re Giles* [1890] 43 Ch. D. 391.

ORIGINATING SUMMONS.

M. Sivalingam for the applicant/defendant.

N.T. Rajah for the respondent/plaintiff.

Cur. Adv. Vult.

Chang Min Tat J.: An objection is taken to this application by a *cestui que trust* under an executed deed of trust against the grantee for an order to administer the trust, by way of an originating summons under 0.55 r.4 of the Rules of the Supreme Court. It is contended by the grantor that in view of the serious disputes as to facts, the action should have been commenced by writ.

It might be convenient to commence by considering the authorities on the applicability of an originating summons. An application made under 0.55 r.4 by an originating summons is, *inter alia*, for administration of a trust. This must presuppose the

existence of a valid trust as to which there is no dispute, the only difference or differences between the trustees and the beneficiaries being the state of the administration. It is the contention of the plaintiff, contra the application, that in the first place there is no dispute as to facts but only a dispute as to the law of trusts and of procedure and that in the second place even if there is a dispute of facts which arises during the hearing of the summons, the matter can be adjourned into open court for the taking of evidence. Whether or not there is a dispute as to facts will be apparent in a consideration of the several affidavits filed herein which I shall have to and propose to deal with later. But so far as the law is concerned, the valid constitution of a trust is a matter to be determined on facts to be found by a trial court so that it occurs to me that even on the strength of the submission of learned counsel for the plaintiff and his admission, there is a dispute as to facts and that necessarily calls for evidence to be taken.

As for the adjournment into open court, counsel for the plaintiff relies on 0.54 r.9 and on a passage at page 1494 of the 1960 *Annual Practice* in the notes to 0.59 r.3 under the heading "dispute as to facts" but it is clear even on his reading that in an originating summons supported by affidavits, such evidence is limited to the cross-examination of deponents on their affidavits.

He also relies on the case of *Re Yeap Chor Ee*[1] where the question posed in the originating summons was whether a deed of settlement made by the testator constituted a good and valid trust of certain shares. With respect, I do not myself consider that this case is of any assistance. There was, as appears clearly in the judgment no dispute as to facts and indeed Spenser Wilkinson J. (as he then was) who heard the application made it clear that the deed must be construed solely from a consideration of its wording and the fact that no transfer of the shares constituting the trust property had been executed. Counsel for the plaintiff might have relied on the case of *Ponniah* v. *Chinniah*,[2] in which the Court of Appeal held that it was not necessarily fatal to commence foreclosure proceedings by an originating summons even though there was to the knowledge of the applicant's solicitors a dispute as to facts, but I think this decision must be read in the light of the learned Chief Justice's observation that the proceedings should have been commenced by writ, and also the fact that no objection was taken thereto, as in this case.

Learned counsel for the grantor relies on *Foon Seong* v. *Chan San Choon*[3] in which it was held that an originating summons was not a suitable process where the plaintiff was really asking for a decision as to whether there was a valid trust by the deceased in his favour. The application was on an objection taken, dismissed with costs, without prejudice to the plaintiff taking any other form of proceedings to determine the points at issue.

Another case relied upon is *Ong Yok Chu & Anor.* v. *Yong Teck Fong*[4] where Ismail Khan J. (as he then was) held that in an application for a declaration by the plaintiffs of beneficial ownership in a certain piece of land and for an order for execution of transfer of the remaining half-share therein by the vendor, it would be contrary to all decided authorities to try disputed issues of fact on an originating summons.

In *In re Giles*[5] at page 398 for which I am greatly indebted to learned counsel for the grantor, there occurs this passage from the judgment of Cotton L.J. which with respect appears to me to contain the clearest expression of judicial opinion on this point:

"This is an appeal brought by special leave, without a certificate by the judge, from an order made by Mr. Justice North in chambers, dismissing so much of an action commenced by originating summons as appeared to have the object of settling the question which had been raised by the defendants, the trustees, whether they had priority for their mortgage over the plaintiffs' mortgage. The defendants who claim are trustees but their claim to the mortgage is not as trustees, but as mortgagees under a contract between them and one of their *cestuis que trust*, independently of their position as trustees. There may be a question as to the validity of their mortgage having regard to their position as trustees, but the question of priority does not arise in the administration of the trust. The judge decided either that he had no jurisdiction to decide the question of priority of the mortgages upon an originating summons, or, that if he had, it was not proper to decide it in an action commenced in that manner. I agree with him. In my opinion the court has no jurisdiction to decide such a question on an originating summons; but I decidedly hold that, if it has jurisdiction, it is not proper to decide it upon an originating summons. Under the rules the court has jurisdiction only to decide on certain special matters on an originating summons, and the question whether the court has jurisdiction in this case depends upon whether the rules give it power to decide the questions at issue here. I cannot find in Order LV., rule 3, anything justifying such a point as this being determined upon an originating summons. The appellants relied on clause (g), but that clause only relates to questions arising in the administration of an estate as between trustees and their *cestuis que trust*. It was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question. Rule 5A was also referred to, and it was argued that in order to work out a judgment for redemption or foreclosure effectually it was often necessary to decide on the priority of mortgages, and therefore that the rule empowers that to be done. I do not agree with that. It is true that questions involving priority do often arise in working out redemption or foreclosure, and if there is an action commenced in the usual way, the court has no difficulty in dealing with them: but if the plaintiffs choose to come to the court upon an originating summons because it may be more convenient to them on the ground of saving expense or otherwise, yet if the relief claimed does not come within the terms of Order LV., there is no jurisdiction to give such relief. I am of opinion that it would be very wrong to decide such questions as this in these informal proceedings. This mode of procedure is fitter to decide matters which are not of an involved nature, and not questions which may require considerable discretion. In my opinion the decision of Mr. Justice North was right."

On the authorities, it would appear that questions of jurisdiction apart, courts would refuse to decide questions of fact on an originating summons as a matter of some inconvenience.

To turn now to the averments in the several affidavits. It is not in dispute that on a certain unspecified day in September 1970 the settlor executed a deed in favour of his son the plaintiff and his wife in consideration of his natural love and affection for them. The trust deed is, with respect, a document of

some curiosity. It recited that the grantor was the sole proprietor of a business known as the Perak Oil Mills, that he was the registered proprietor and lessee (if I may correct an obvious mistake) of certain lands, as set out in the first schedule and finally that he was in the process of forming a limited company to take over his business and was desirous in the meanwhile of transferring his business and lands to the grantees with a view to a sale of the same by the trustees to the limited company upon incorporation. Then in consideration of his natural love and affection for the grantees, the grantor assigned unto the grantees the goodwill, assets and liabilities of the grantor's business, more particularly set out in the third schedule thereto and the lands in the first schedule upon certain trusts as set out. Then, after having assigned his business and lands, the grantor in clause 2 was expressed to hold the same upon trust to proceed with the incorporation of a private limited company and upon trust after the incorporation to sell the business and lands to the company at a minimum price of $500,000 and to hold the proceeds upon trust for the persons and in the proportions set out in the second schedule. They consisted of the grantor's 7 sons including the plaintiff and included the grantor himself and his wife. The other two clauses of the deed provided for re-investing the proceeds of the sale in the company, the holdings of the shareholders during their minority, the status of the grantees as subscribers to the memorandum and articles of association of the company.

It is apparent that the company was to be formed with a fully-paid up capital of $500,000 paid for by the value of the grantor's business and lands and the shares would be 500,000 $1 shares, issued in the proportions set out to the grantor, his sons and his wife. The grantor was to get 4990 shares, his wife 10. the rest going to his sons, all of whom would get 40,000 each except the plaintiff who would receive 255,000. Not unnaturally with his substantially inflated holdings in the company to be formed the plaintiff was more than interested in putting the trust into effect and it is not unworthy of note to observe that neither the other grantee, the grantor's wife, nor the other sons were required by the plaintiff to join in the action.

The orders sought for by the plaintiff against his father, the grantor, are for carrying out the trust as in the deed by the court, for all necessary vesting and other orders in respect of the trust property and for all proper consequential directions, accounts and enquiries and for costs.

To this application, the grantor by his solicitors entered a conditional appearance and well within time, applied to set aside the proceedings on an objection taken to the use of an originating summons. In his affidavit in support, he denied that there was a valid trust. He exhibited thereto several letters, particularly one of his written to his accountants with copy to the plaintiff and their then solicitors, indicating a change of heart and an intention of treating all his sons equally, so that the plaintiff was not preferred as against the others. *En passant*, it would appear to be not without significance that the trust-deed relied upon by the plaintiff was undated and unstamped. The correspondence between the solicitors establishes with reasonable certainty that the company had since been incorporated but the implementation of the trust and the execution or registration of the various relevant transfers could not be proceeded with in view of new instructions from the grantor. The result is that at the moment there is a company formed but without any assets, the lands as well as the business remaining registered in the name of the grantor.

In reply, the plaintiff denied the existence of any dispute as to the constitution and validity of the deed of trust, but admitted a dispute arose from the grantor's refusal to implement or complete the implementation of the trust. The plaintiff instanced the execution of two transfers of land by the grantor to him and the grantor's wife as proof of the constitution of the trust and contended that the trust was validly and completely constituted and it was irrevocable since no power of revocation was reserved therein.

Thereupon, the grantor exhibited the draft minutes of a meeting held on 21st November 1970, *i.e.* subsequent to the execution of the trust deed, at which the grantor expressed a desire to give all his sons an equal share and it was agreed, *inter alia*, that in order to retain his controlling interest, plaintiff should make up the difference to his brothers either by relinquishing his share in the other assets or by paying cash or partly by one and partly by the other. A photostat copy of the minutes taken of this further agreement was exhibited. The signatures of both the plaintiff and the grantor appear thereon.

The plaintiff managed to get in a last word in his latest affidavit. He did not seek to deny the existence of this document, but rather curiously and it is observed in contradiction of the very terms of this document, sought in the first place to submit that it was inadmissible as it "related to an informal discussion held during the course of negotiations", and secondly to aver if the court should hold it admissible, that the negotiations were fruitless, as the grantor underwent another change of mind.

Proviso (d) to section 92 of the Evidence Ordinance enables proof to be adduced of any distinct subsequent oral agreement to rescind or modify any contract, grant or disposition of property. It follows that proof of a written agreement modifying the first contract is clearly admissible and from a pragmatic point of view would be the more easily adduced: see *Ponniah* v. *Chinniah, supra*. With the greatest of respect to counsel for the plaintiff, I am not able to accept his contention as valid that it is not admissible and with equally great respect, I cannot appreciate the further contention that the subsequent change of heart of the grantor had no bearing. The subsequent change might lead to another consensual variation. If so, then it remains for the court to find what is the actual agreement that was reached. If it did not, then the question remains whether the grantor had so bound himself contractually that he must be made to perform specifically any contract entered into validly by him and as varied consensually.

This must clearly mean at the least and other considerations, questions and issues apart, that evidence would have to be led, and in turn, on the authorities, that an originating summons is not a suitable medium or process for the determination of the issues raised.

The application must be allowed and the originating summons dismissed *in limine*.

On the question of costs, I have thought at first of making an order that each party should bear its own costs but on further consideration I have come to the view that the plaintiff is wanting in frankness and I cannot but regard his last affidavit as a distortion of facts apparent even on a cursory reading of the subsequent agreement. In these circumstances, the plaintiff should be made to bear the costs of the proceedings and I so order.

Application allowed.

Solicitors: *Lim Cheng Ean & Co.; Maxwell, Kenion, Cowdy & Jones.*

PUBLIC PROSECUTOR v. ADNAN BIN KHAMIS

[A.Cr.J. (Syed Agil Barakbah) August 18, 1971]

[Alor Star — Criminal Appeal No. 16 of 1971]

Criminal Law and Procedure — Judicial Precedent — Conflicting opinions of appellate courts — Decisions of Court of Appeal of Federated Malay States and of Court of Appeal of Sarawak, North Borneo and Brunei — Malaysia Act, 1963, s. 88(3).

Penal Code, s. 304A — Negligence — Standard of negligence.

In this case the accused had been charged with causing the death of one Abdul Halim by doing a negligent act, to wit shooting with a shot gun. The learned president of the sessions court acquitted the accused on the ground that the negligence shown in the case was not of such a high degree as required for a case of manslaughter as laid down in *Cheow Keok* v. *Public Prosecutor*.[1] On appeal,

Held, allowing the appeal: (1) there was a conflict between the decision of the Court of Appeal of the Federated Malay States in *Cheow Keok* v. *Public Prosecutor* and the decision of the Court of Appeal of Sarawak, North Borneo and Brunei in *Public Prosecutor* v. *Mills*[10] and until the question of the two conflicting decisions is settled by the Federal Court, the court was, by virtue of section 88(3) of the Malaysia Act, bound by the decision of *Public Prosecutor* v. *Mills* which is deemed to be a decision of the Federal Court;

(2) in this case the action of the accused in firing the shot that killed the deceased was a negligent act and the prosecution had proved a *prima facie* case against the accused and therefore the accused should be called upon to enter on his defence.

Cases referred to:-

(1) *Cheow Keok* v. *Public Prosecutor* [1940] M.L.J. 103, C.A.

(2) *Krishnan* v. *Public Prosecutor* [1948] M.L.J. 12.

(3) *R.* v. *Bateman* (1925) 94 L.J.K.B. 791, C.C.A.

(4) *Andrews* v. *Director of Public Prosecutions* [1937] A.C. 576 H.L. at pp. 582, 583; [1937] 2 All E.R. 552 at pp. 555, 556.

(5) *R.* v. *Jones* (1874) 12 Cox C.C. 628.

(6) *R.* v. *Weston* (1879) 14 Cox C.C. 346, 352.

(7) *R.* v. *Archer* (1858) 1 F. & F. 351; 175 E.R. 760.

(8) *R.* v. *Campbell* (1869) 11 Cox C.C. 323.

(9) *Mah Kah Yew* v. *Public Prosecutor* [1971] 1 M.L.J. 1.

(10) *Public Prosecutor* v. *Mills.* [1971] 1 M.L.J. 4.

(11) *Woo Sing & Anor.* v. *R.* [1954] M.L.J. 200.

(12) *Anthonysamy* v. *Public Prosecutor* [1956] M.L.J. 247.

(13) *China Insurance Co. Ltd.* v. *Loong Moh Co. Ltd.* [1964] M.L.J. 307.

(14) *K.E. Mohamed Sultan Maricar* v. *Prudential Assurance Co. Ltd.* [1941] M.L.J. 20.

(15) *Hendry* v. *De Cruz* [1949] M.L.J. Supp. 25.

(16) *Butler-Madden* v. *Krishnasamy & Ors.* [1947] M.U.L.R. 163.

(17) *Velazquez Ltd.* v. *Inland Revenue Commissioners* [1914] 3 K.B. 458 at p. 461.

(18) *Young* v. *Bristol Aeroplane Co. Ltd.* [1943] 1 K.B. 718

MAGISTRATE'S CRIMINAL APPEAL.

Abdul Malik bin Mohamed Salleh (Deputy Public Prosecutor) for the appellant.

R. C. Murugeson for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an appeal by the learned deputy public prosecutor against the acquittal and discharge of the respondent under section 304A of the Penal Code by the learned president of the sessions court, Sungei Patani.

The charge reads as follows: —

"That you on the 27th day of December, 1969, at about 6.45 a.m. at Bukit Tupah, Merbok, in the mukim of Merbok, in the district of Kuala Muda, in the State of Kedah, caused the death of one Abdul Halim bin Saad by doing a negligent act not amounting to culpable homicide, *to wit*, by shooting with a double barrel shot gun No. 117080 in the jungle of Bukit Tupah, and that you have thereby committed an offence punishable under section 304A of the Penal Code."

The main ground of appeal was that the learned president in acquitting and discharging the respondent without calling upon him to enter on his defence acted against the weight of evidence adduced by the prosecution. It was submitted there was sufficient evidence adduced by the prosecution to prove the necessary high degree of negligence on the part of the respondent as required by the case of *Cheow Keok* v. *Public Prosecutor*.[1]

The facts of the case were sufficiently dealt with by the president and it is not necessary for me to repeat them. In concluding the facts, the learned president cited *Krishnan* v. *Public Prosecutor*,[2] the relevant portion of which says: —

"... It is essential to elicit evidence to show the actual situation with which the driver was faced in relation to his speed and other factors of driving and whether he got into this situation through his own or another's carelessness or rashness. The fact of knocking down a pedestrian on the road is not *ipso facto* conclusive of gross negligence."

The case was connected with a motor vehicle accident but he was of the opinion that the same principle ap-